STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL MAYWORM,

Plaintiff-Appellant,

v

J. G. MORRIS, LLC,

Defendant-Appellee.

UNPUBLISHED
March 27, 2007

No. 273397
Wayne Circuit Court
LC No. 04-429315-NO

Before: Zahra, P.J., and Bandstra and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting summary disposition in favor of defendant. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In October 2003, defendant, a general contracting firm, was in the process of building a dental office in Woodhaven. Plaintiff worked for DiClaudio Construction, a subcontractor hired to set the walls and install the roof trusses. On October 16, a wall of the partially completed building collapsed with plaintiff inside, injuring his back and arm. Plaintiff filed suit, seeking damages from defendant under the common work area doctrine. The trial court found that plaintiff failed to establish the four elements of such a claim as set forth in *Ormsby v Capital Welding, Inc*, 471 Mich 45; 684 NW2d 320 (2004), and granted summary disposition in favor of defendant.

On appeal, plaintiff asserts that the trial court erred in finding he had not established that the hazard presented by the structure in question was readily observable or that it presented a danger to a significant number of workmen.

We review de novo a trial court's decision to grant or deny summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). Under MCR 2.116(C)(10), summary disposition is appropriate when there is "no genuine issue as to any material fact." A question of material fact exists "when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). In deciding on a motion under this rule, we consider "the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party to determine

whether a genuine issue of any material fact exists to warrant a trial." *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999).

The common work area doctrine provides an exception to the general common law rule that property owners and general contractors "could not be held liable for the negligence of independent subcontractors and their employees." *Ghaffari v Turner Const Co*, 473 Mich 16, 20; 699 NW2d 687 (2005). Because general contractors have responsibility for coordinating an array of subcontractors, they must take reasonable steps "to guard against readily observable, avoidable dangers in common work areas." *Id.*, 21, 23, quoting *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds in *Hardy v Monsanto Enviro-Chem Systems, Inc*, 414 Mich 29; 323 NW2d 270 (1982). To recover under the common work area doctrine, a plaintiff must show that:

> (1) the defendant, either the property owner or the general contractor, failed to take reasonable steps within its supervisory and coordinating authority (2) to guard against readily observable and avoidable dangers (3) that created a high degree of risk to a significant number of workmen (4) in a common work area. [*Ormsby*, *supra*, 57.]

The failure to establish any one of these four elements is fatal to a plaintiff's claim. *Id.*, 59 n 11.

In the instant case, the evidence establishes that the structure being built by defendant constituted a common work area. It is not necessary to have multiple subcontractors working on a site at the same time in order for it to be considered a common work area. *Hughes v PMG Building, Inc*, 227 Mich App 1, 6; 574 NW2d 691 (1997). Rather, a common work area exists if the employees of two or more subcontractors will eventually work in the area. *Id.* Here, defendant's project manager, Todd Matheson, testified that numerous subcontractors other than DiClaudio worked on the site.

Additionally, the trial court found that because Matheson left the work site even after he observed safety violations, defendant failed to take reasonable steps within its coordinating authority. But the court further held that the danger presented by the building was not readily observable.

Matheson testified that he did not see the carpenters do anything that gave him cause for concern. But plaintiff stated they were bracing the trusses in a manner that he did not believe to be safe. Further, he testified that the wall that collapsed had no bracing whatsoever.

In distinguishing the common work area doctrine from the open and obvious doctrine used in general premises liability cases, there is essentially no difference between an "open and obvious hazard" and a "readily observable and avoidable danger." *Ghaffari*, *supra*, 22. A hazard is open and obvious if an ordinary person of average intelligence would "have been able to discover the danger and the risk presented upon casual inspection." *Novotney v Burger King Corp* (*On Remand)*, 198 Mich App 470, 475; 499 NW2d 379 (1993).

When viewing the testimony presented in the instant case in a light most favorable to plaintiff, reasonable minds could disagree as to whether a person of average intelligence would

have discovered the danger presented by the lack of proper bracing upon casual inspection. Thus, a question of material fact exists as to whether defendant failed to take reasonable steps to guard against a readily observable hazard.

Nevertheless, even though plaintiff presented sufficient evidence to survive summary disposition under MCR 2.116(C)(10) on three of the four elements of the common work area doctrine, the trial court did not err in granting defendant's motion. The evidence did not establish that the danger created a high degree of risk for a *significant* number of workers.

In *Hughes*, *supra*, 3, the plaintiff suffered an injury after falling from a porch overhang. This Court concluded that, because the plaintiff was one of only four men who would be working on the overhang, the defendant did not breach its duty to guard against a danger posing a high degree of risk to a significant number of workmen. *Id.*, 7-8.

In the instant case, plaintiff asserts there were at least seven people present at the work site on the day the wall collapsed. This figure is based on plaintiff's testimony that he believed DiClaudio's carpenter crew of four people (including himself), DiClaudio's foreman, Matheson, and a crane operator were present at the site. Plaintiff argues that, unlike the four workers in *Hughes*, seven people is enough to create a genuine issue of material fact as to whether a significant number were exposed to danger.

In *Ormsby*, *supra*, 59, our Supreme Court noted that the high degree of risk to a significant number of workers must exist at the time of the plaintiff's injury. Here, although plaintiff testified that he spoke with Matheson at some point during his employment with DiClaudio, he did not state that the project manager was present at the time of the collapse. Matheson's uncontroverted testimony established that he was not at the site when the accident occurred.

Further, defendant argues, and the trial court found, that the crane operator, because he was in a protected place inside the cab of his vehicle, should not be included in the number of workers exposed to danger. We note, however, that an examination of the evidence reveals that the crane operator, like Matheson, was no longer at the site when the collapse occurred. Although both Matheson and plaintiff testified that the crane operator had been there earlier in the day, they agreed that all of the trusses, along with the temporary bracing, had been installed before the collapse. According to Matheson's descriptions, the only work left—the installation of the permanent bracing—did not require use of the crane. Additionally, Matheson specifically testified that only DiClaudio's foreman and workers were at the site when the structure collapsed.

More importantly, plaintiff testified that at the time of the accident only he and two other carpenters were working inside the building. Rather than assisting them, DiClaudio's foreman observed their progress from a seat inside a truck parked outside the structure. Like the four men working on the porch overhang in *Hughes*, only the three workers in the structure were exposed to a high degree of risk at the time of plaintiff's injury. Thus, the trial court did not err in determining that as a matter of law this did not constitute a significant number of workers. Because plaintiff failed to establish all four elements of a claim under the common work area doctrine, we affirm the trial court's order granting Morris' motion for summary disposition.

Plaintiff argues against this result by asserting that a significant number of workers were in danger because another group of seven or eight carpenters were working on a neighboring structure at the time of the collapse. Although this second structure was only fifteen or twenty feet away from the one built by defendant, it is undisputed that the workers at that site were framing the interior of a nearly finished building on the day of the accident. As with DiClaudio's foreman, they were not exposed to a high degree of risk from the collapse. Consequently, their presence nearby does not prevent defendant from being entitled to summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Brian K. Zahra
/s/ Richard A. Bandstra
/s/ Donald S. Owens